Supreme Court, U.S.
FILED
APR 1 1999
CLERK

No. 98-1430

In The

Supreme Court of the United States

October Term, 1998

RONALD A. BROWN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

Otho M. Thompson, City Solicitor
Kathryn E. Kovacs, Assistant Solicitor*
Baltimore City Law Department
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3271
Counsel for Respondent
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1688

QUESTIONS PRESENTED

I. DOES THE CITY OF BALTIMORE'S AFFIRMATIVE ACTION PLAN CONSTITUTE AN OFFICIAL POLICY, PRACTICE, OR CUSTOM UNDER 42 U.S.C. §§ 1981 AND 1983 ALTHOUGH IT BEARS NO NEXUS TO THE ACTIONS CHALLENGED IN THIS CASE?

II. DOES THE CITY OF BALTIMORE'S AFFIRMATIVE ACTION PLAN CREATE AN INFERENCE THAT IT WOULD HAVE BEEN FUTILE FOR THE PETITIONER TO APPLY FOR EMPLOYMENT ALTHOUGH IT BEARS NO NEXUS TO THE ACTIONS CHALLENGED IN THIS CASE?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

REASONS THE WRIT SHOULD BE DENIED 5

I. THE COURT OF APPEALS HELD CORRECTLY THAT SINCE THE AFFIRMATIVE ACTION PLAN BORE NO NEXUS TO THIS CASE, THE PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT 5

II. THE COURT OF APPEALS HELD CORRECTLY THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF THE AFFIRMATIVE ACTION PLAN AT TRIAL 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 8

Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986) 7, 9, 10

Burtnick v. McLean, 953 F.Supp. 121 (D.Md. 1997) 3

Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982) 7, 9

Cerrato v. San Francisco Comm. College Dist., 26 F.3d 968 (9th Cir. 1994) 6, 9

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 6

Dennis v. County of Fairfax, 55 F.3d 151 (4th Cir. 1995) 7

Franks v. Bowman Transp. Co, Inc., 424 U.S. 747 (1976) 10, 11

General Elec. Co. v. Joiner, 118 S.Ct. 512 (1997) 8

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 11

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 6

Lanphear v. Prokop, 703 F.2d 1311 (D.C. Cir. 1983) 7, 9, 10

Lewis v. Alamance County, N.C., 99 F.3d 600 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997) 8

McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988) 7, 9

Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658 (1978) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C. § 1981 1

42 U.S.C. § 1983 1

42 U.S.C. § 2000e-2 1

Federal Rules of Civil Procedure 61 8

Federal Rules of Evidence 103(a) 8

STATEMENT OF THE CASE

The Petitioner seriously misrepresents the facts of this case without providing citations to the record. Although the facts are largely irrelevant given the issues presented for review, the Respondent will correct the Petitioner's more egregious errors with citations to the Joint Appendix submitted to the Court of Appeals.

In his Complaint, the Petitioner alleged that the Respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and 42 U.S.C. §§ 1981 and 1983 by abolishing his position and not rehiring him on the basis of race. The United States District Court for the District of Maryland granted the Respondent's motion for judgment at the close of the Petitioner's evidence at trial. The United States Court of Appeals for the Fourth Circuit affirmed.

The Petitioner, a white man, supervised the Municipal Telephone Exchange as Administrator of Telephone Facilities in the Baltimore City Comptroller's Office. (J.A. 583.) Jacqueline F. McLean, a black woman, won the election for City Comptroller in November of 1991 and appointed a transition team to assist her in assuming the office as the first new Comptroller in twenty-eight years. McLean adopted the recommendation of the transition team, (J.A. 931, 935), that the Administrator of Telephone Facilities position be abolished and a new position, Director of Communication Services, be created to supervise both the Municipal Telephone Exchange and the Municipal Post Office. The Budget Office concurred and forwarded the recommendation to the Board of Estimates,

which abolished the Petitioner's position and created the new position. (J.A. 543-44, 1070-77.)

McLean advised the Petitioner of the Board of Estimates' action by letter on May 26, 1992. (J.A. 902.) As the holder of an abolished position, the Petitioner was entitled to have his name placed on a reemployment list for the position which, in the judgment of the Civil Service Commission, most closely approximated his prior position. (J.A. 1060.) The Civil Service Commission placed the Petitioner on the reemployment list for Telephone Supervisor and so notified him. (J.A. 1078.) The Petitioner never contacted the Civil Service Commission to discuss his placement on that list, even though he could have spoken to an advisor about his situation. (J.A. 622, 1033.)

Rochelle Young, a black man, was provisionally appointed as Director of Communication Services on July 1, 1992. This appointment, contrary to the Petitioner's bald assertion, (Pet. for Writ of Cert. at 5), was entirely appropriate, and there is no evidence to the contrary. As a provisional appointment, Young had to compete with other applicants for the position. (J.A. 345, 431, 890.) The City posted the job announcement for Director of Communication Services at the Civil Service Commission, (J.A. 899-90), and advertised in the Baltimore Sun newspaper from August 24 through September 11, 1992, (J.A. 898). The Petitioner never applied for the job, (J.A. 617-18), even though McLean encouraged him to do so, (J.A. 560, 606, 618). Contrary to the Petitioner's assertion, (Pet. for Writ of Cert. at 6), it was Shirley Williams, then Deputy Comptroller and Appointing Officer, (J.A. 962), who interviewed the competitors for the position and

recommended that Young be hired permanently as Director of Communication Services. There was no evidence that McLean did anything more than acquiesce in Williams' decision.

The Petitioner asserts that McLean told Bertram Finkelstein that he could not apply for the position of Audit Manager. (Pet. for Writ. of Cert. at 7.) Actually, after his position as Deputy City Auditor was abolished, Finkelstein continued working for the City as Audit Manager with the same responsibilities and salary until he retired voluntarily. (J.A. 323-24.) The Petitioner also asserts that McLean did not hire any white men during her tenure. (Pet. for Writ. of Cert. at 10.) In reality, McLean hired Arthur Held, a white man, as Real Estate Officer on April 20, 1992. (J.A. 70, 384, 1013-17.)

The Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC) on February 3, 1993. (J.A. 881). The EEOC issued a Determination finding no reasonable cause to believe that Title VII had been violated. (J.A. 883-84.) The Petitioner then filed a Complaint in the District Court against the Mayor and City Council of Baltimore and Jacqueline F. McLean in her official capacity as Comptroller.

The Petitioner filed a motion for partial summary judgment asking the trial court to hold that the Respondent's Affirmative Action Plan violated Title VII and the Fourteenth Amendment. (J.A. 26-54.) The trial court denied the Petitioner's motion. (J.A. 77-89.) Adopting the reasoning of the parallel case of *Burtnick v. McLean*, 953 F.Supp. 121, 124 (D.Md. 1997), the trial court held that "there is no evidence in this case that the complained of

actions were taken pursuant to the City's affirmative action policy. Therefore, the issue of whether that policy is constitutional is not properly before the Court." (J.A. 80.)

Before trial, the Respondent filed a motion in limine to exclude all evidence of the Affirmative Action Plan arguing that it was not relevant to the case. (J.A. 90-91, 144-46.) The Petitioner replied that the Affirmative Action Plan had been marked for evidence, but "would not be offered for evidence, unless at some point [it] become[s] independently relevant." (J.A. 146.) The court, therefore, granted the Respondent's motion in limine excluding the Affirmative Action Plan. (J.A. 149.) The Petitioner never offered the Affirmative Action Plan as evidence at trial.

On appeal, the Petitioner argued that the trial court should have admitted into evidence and considered the constitutionality of the Affirmative Action Plan. Although the Petitioner recognized that "there is no direct evidence" linking the Plan to this case, he argued that "McLean's management philosophy and actions . . . were completely consistent with and in keeping with the City's Affirmative Action Plan," such that a connection could be inferred. (*See* Appellant's Brief at 35-36.) The Court of Appeals panel unanimously rejected this argument. (App. 14-16, 20 n.1.) First, the court held that since there was no "nexus" between the Affirmative Action Plan and this case, and since on summary judgment all inferences must be drawn in favor of the non-moving party (the Respondent), the trial court properly denied the Petitioner's motion for summary judgment. (App. 14-15.) Second, the court held that the trial court did not

abuse its discretion in excluding evidence of the Affirmative Action Plan at trial. (App. 16.)

SUMMARY OF ARGUMENT

This case does not present a conflict among the Circuits or any important issue warranting a Writ of Certiorari. On the contrary, the Court of Appeals simply applied settled rules to the facts of this case and held unanimously that the Petitioner was not entitled to summary judgment and that the trial court did not abuse its discretion in excluding evidence of the Affirmative Action Plan.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS HELD CORRECTLY THAT SINCE THE AFFIRMATIVE ACTION PLAN BORE NO NEXUS TO THIS CASE, THE PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT.

The lower courts did not evaluate the constitutionality of the Affirmative Action Plan because there is no evidence linking the Plan to the actions challenged in this case. (App. 15, 39.) The Court of Appeals held that even if one could infer that McLean acted pursuant to the Plan, such an inference would be improper at the summary judgment stage when all inferences must be drawn in favor of the non-moving party, i.e., the Respondent. "Accordingly, we must infer that McLean did not act

pursuant to the City's affirmative action plan. It is therefore unnecessary for us to determine the validity of the City's affirmative action plan as a matter of law. . . . " (App. 15.)

There is no evidence connecting the Affirmative Action Plan to this case in any way. McLean testified that she was unaware of any City goals for hiring women and minorities. (J.A. 826.) The Petitioner asserts that the Respondent "monitor[s] compliance with its Affirmative Action Plan." (Pet. for Writ of Cert. at 3.) On the contrary, there is no evidence in the record that the City has ever enforced the Plan in this or any case, much less monitored compliance with it.

Under 42 U.S.C. §§ 1981 and 1983, the Petitioner must prove that the challenged actions were taken pursuant to an official City policy. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 735 (1989). The policy must actually inflict the injury; there must be a "direct causal link" between the policy and the alleged violation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). In other words, the policy must be the "moving force" behind the alleged violation. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978). Applying this well-established rule to the facts of this case, the lower courts properly and unanimously held that since the Affirmative Action Plan is totally unrelated to the challenged actions, it is not sufficient to sustain a § 1981 or § 1983 claim. (App. 14-15, 30-31, 39.) There is no conflict among the Circuits on this point.

Under Title VII, courts refuse to assess the validity of affirmative action plans where there is no evidence that the employer acted pursuant to the plan. *E.g., Cerrato v.*

San Francisco Comm. College Dist., 26 F.3d 968, 976 (9th Cir. 1994); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 666 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988); *Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982). Research revealed no case in which the Court of Appeals for the District of Columbia Circuit examined an affirmative action plan without some nexus to the challenged actions. Neither of the cases cited by the Petitioner, *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986), and *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983), evaluated the validity of an affirmative action plan. There is no conflict among the circuits on this point.

Furthermore, since the validity of the Respondent's Affirmative Action Plan was not at issue in the Petitioner's EEOC complaint or in the EEOC investigation, (J.A. 881-84), it may not be reviewed in this case. *E.g.*, *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (only issues included in the original complaint or "any charges that would naturally have arisen from an investigation thereof" may be raised in a subsequent Title VII suit).

II. THE COURT OF APPEALS HELD CORRECTLY THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF THE AFFIRMATIVE ACTION PLAN AT TRIAL.

The Petitioner did not apply for the Director of Communication Services position he claims he was denied on the basis of race. (J.A. 617-18.) To make out a prima facie case under Title VII, therefore, the Petitioner argues that

it would have been futile for him to apply. The Affirmative Action Plan, he contends, should have been admitted in support of his futility argument. (Pet. for Writ of Cert. at 16.) The Court of Appeals held that the District Court did not abuse its discretion in excluding evidence of the Affirmative Action Plan at trial. (App. 16.)

Relevancy determinations are within the discretion of the trial court and are not reversed absent an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). In addition, any error in excluding the Affirmative Action Plan as evidence was harmless in light of the fact that the Petitioner did not apply for the Director of Communication Services job. *See* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a); *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 606 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997). Certainly, this evidentiary ruling does not warrant granting a Writ of Certiorari.

Moreover, the Petitioner never offered the Affirmative Action Plan as evidence. Federal Rule of Evidence 103(a)(2) requires the proponent of excluded evidence to make the substance of the evidence known to the trial court in order to preserve for appeal the argument that the evidence was wrongly excluded. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Since the Petitioner did not offer the Affirmative Action Plan as evidence or specify the substance of the evidence at trial, the Court should refuse to review the trial court's exclusion of the Affirmative Action Plan.

The Petitioner contends that the Fourth Circuit's decision here, along with decisions of the Sixth, Seventh, and Ninth Circuits, conflict with the decisions of the

District of Columbia Circuit in *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986), and *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983). The Courts of Appeals in *Cerrato v. San Francisco Comm. College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994), *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 666 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988), and *Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982), all declined to assess the validity of an affirmative action plan because there was no evidence that the employer acted pursuant to the plan.

Bishopp and *Lanphear* are not to the contrary. As is pointed out above, neither of these cases evaluated an affirmative action plan. Rather, in both cases, the district court recognized the existence of an affirmative action plan, *Bishopp*, 788 F.2d at 783; *Lanphear*, 703 F.2d at 1315, but held in favor of the employer, 788 F.2d at 782; 703 F.2d at 1312. No party in either case challenged the admissibility of the affirmative action plan as evidence. 788 F.2d at 783 n.2, 784 n.3; 703 F.2d at 1315 n.27. Consequently, the Court of Appeals did not address that issue in either case, but simply noted the affirmative action plan along with other evidence in reversing the district court. 788 F.2d at 787; 703 F.2d at 1315. Thus, *Bishopp* and *Lanphear* do not, as the Petitioner asserts, conflict with the Fourth Circuit's ruling in this case. (Pet. for Writ of Cert. at 16-17.)

Moreover, the affirmative action plan was linked to the challenged actions in both cases. In *Lanphear*, the plan currently being developed specifically required that a black man be hired for the plaintiff's job in the same year he sought reappointment. 703 F.2d at 1313. In addition,

the agency head was actively pressuring her subordinates to hire minorities at that time. *Id.* The plaintiff was "amply qualified," *id.* at 1315, and had received favorable evaluations, *id.* at 1312, but was not considered for the position and was passed over in favor of a black man whose qualifications were not fully reviewed, *id.* at 1315. These elements together made out a prima facie case of discrimination.

Likewise in *Bishopp*, the affirmative action plan was currently being developed, the hiring official was under pressure to promote a minority, and the Mayor and Fire Chief were both black. 788 F.2d at 787. In addition, the plaintiffs were more qualified than the black man who received the promotion "in an unprecedented fashion." *Id.* at 786. Again, these elements together made out a prima facie case of discrimination. In this case, by contrast, there is no evidence whatsoever linking the Affirmative Action Plan to the challenged actions. Therefore, *Bishopp* and *Lanphear* have no bearing here.

The Petitioner argues that proof of a discriminatory policy allows the inference that individual decisions were made pursuant to the policy. (Pet. for Writ of Cert. at 18-20.) The cases the Petitioner cites, however, are inapposite here. In *Franks v. Bowman Transp. Co, Inc.*, 424 U.S. 747 (1976), a class of blacks established that they were not hired because of their race. The issue was whether particular class members were entitled to retroactive seniority as part of their remedy. *Id.* at 750. This Court held that upon proof of a discriminatory pattern or practice as to the class as a whole, the Court would presume at the remedy stage that each individual class member was

entitled to relief beyond an injunction. *Id.* at 772. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), applied *Franks* in pattern or practice suits brought by the federal government.

The *Franks* presumption arises only in class action, pattern or practice cases and only at the remedial stage after the plaintiffs have proven that the policy, pattern, or practice at issue was discriminatory. All of the cases cited by the Petitioner fit in that category. This case does not. This is neither a class action nor a pattern or practice case. In fact, there is no evidence that the City has ever enforced the Affirmative Action Plan, much less established a pattern or practice of discrimination. Since the Petitioner never proved the elements of his claim, this case never reached the remedial stage. Thus, the *Franks* presumption is inapplicable here. Moreover, this Court in *Teamsters* refused to apply the *Franks* presumption to class members who had not applied for the job at issue, imposing the burden on the plaintiffs to prove their entitlement to relief. 431 U.S. at 371. Thus, the *Franks* presumption is not relevant here, in addition, because the Petitioner did not apply for the Director of Communication Services position.

CONCLUSION

Since this case does not present a conflict among the circuits or any important issue, but rather applies settled rules to the facts of this case, and for the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

OTHO M. THOMPSON, City Solicitor
KATHRYN E. KOVACS, Assistant Solicitor*
Baltimore City Law Department
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3271
Counsel for Respondent
* *Counsel of Record*